IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA STATE CONFERENCE OF THE NAACP, *et al.*,	)	
Plaintiffs,	)	
	)	CASE NO.
v.	)	2:16-cv-00731-WKW
STATE OF ALABAMA, *et al.*,	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS (DOC. 17)

The Eleventh Circuit could not have been clearer: "As part of any *prima facie* case under Section Two, a plaintiff must demonstrate the existence of a proper remedy." *Davis v. Chiles*, 139 F.3d 1414, 1419 (11th Cir. 1998). And the remedy Plaintiffs seek here -- subdistricting to elect judges -- is *not* a proper remedy. *Id*. at 1423-24; *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994); *Southern Christian Leadership Conference of Alabama v. Sessions*, 56 F.3d 1281. Plaintiffs therefore have not made a *prima facie* case, and their claim is due to be dismissed.

Plaintiffs argue that these clear rules of law cannot be applied until the parties conduct expensive discovery and the Court holds a long trial. Defendants, the State of Alabama and Secretary of State John H. Merrill, disagree, and respectfully submit this reply brief in support of their Motion to Dismiss.

I. The Eleventh Circuit's clear holdings may be applied at the motion to dismiss stage.

It is true that the Eleventh Circuit opinions in *Nipper*, *SCLC*, and *Davis* were each issued after a bench trial in District Court. That does not make the holdings any less binding, nor does it mean that the holdings of law in those opinions may be applied only after a trial. When our Circuit Court says that a Plaintiff must plead an appropriate remedy to assert a valid claim, that is the law of this Circuit at every stage of litigation. To proceed past the motion to dismiss phase, a complaint must "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). As a result of the Eleventh Circuit's holdings, Plaintiffs have not stated a plausible claim when they seek an inappropriate remedy, and that rule can and should be enforced at the motion to dismiss stage.

The District Courts in *Nipper*, *SCLC*, and *Davis* obviously did not have the benefit of the Eleventh Circuit's later holdings. Without those decisions to rely on, it is not surprising that the District Courts would hold trials in those early cases. The law developed as the Court considered case after case, and with the benefit of those three opinions we can now be certain that the State's strong interests in at-large elections outweigh any interest Plaintiffs have in restructuring Alabama's judicial branch. The Eleventh Circuit has not "been able to envision any remedy that a court might adopt in a Section Two vote dilution claim to a multi-member

judicial election district," *Davis*, 139 F.3d at 1423-24, and these Plaintiffs have not come with anything new.

Another trial will not lead to a different result. The kind of racial history that would be considered here was already under the microscope in *Nipper*, *SCLC* and *Davis* (Alabama's history specifically in *SCLS*). Three times, on three different records, the Eleventh Circuit agreed that this history, the success rate of African-American judicial candidates, the history of block voting, *etc.*, were insufficient to outweigh the State's strong interest in at-large judicial elections. We do not need a fourth trial record to know that the State's linkage interest is real and that it outweighs Plaintiffs' interests in having a federal court make drastic changes to State government that would alter the very nature of the judicial office.

One might have expected Plaintiffs to highlight ways that the record they hope to develop will differ from the records in *Nipper*, *SCLC*, or *Davis*, but they did not. The Plaintiffs in this case allege nothing new. They do not allege that there is more discrimination in the hearts of voters than allegedly existed in 1995 when the *SCLC* panel considered Alabama judicial elections. They do not allege that partisan politics is less of an explanation of the outcome of judicial elections than in 1995, and they do not allege that there is more block voting today. Except for the fact that the specific judges at issue here happen to be appellate judges and not trial judges, Plaintiffs do not say how this case is any different from those that

came before (and as discussed below, the trial-appellate "distinction" is not a real difference).

Consider what that fourth record would entail, and the time and money it would take to develop it and present it in a bench trial: competing sets of districting plans for the three appellate courts; fights about whether those districts have too many or too few minority voters; experts on judicial history and block voting; analyses of where lawyers live (because redistricting may limit the pool of eligible candidates in some proposed districts); depositions of sitting judges to discuss the damage Plaintiffs' remedy would do to the courts; and so forth. All that effort and money just to get to the same place we are now, which is the unavoidable conclusion that the remedy Plaintiffs seek is not available. Only if Plaintiffs appeal a dismissal and convince the Eleventh Circuit to reverse itself should the parties and the Court spend such resources on discovery.

Defendants thus contend that the Court could dismiss this claim in two ways. One is to find that under Eleventh Circuit precedent, there is no need to dig into the "totality of the circumstances" when plaintiffs seek to require a State to ditch a 150-year-old system of at-large elections and divide voters by race, because the remedy is inappropriate as a matter of law. Another is to say that to the extent it is necessary to dig into the "totality of the circumstances," the digging has already been done in earlier cases. The circumstances Plaintiffs allege, taking their factual

allegations as true, give them no greater interest in their remedy than the Plaintiffs in the *Nipper* line of cases. Those allegations were not sufficient to outweigh the State's interests in the 1990's, and they are not sufficient now.

II. All the reasons that subdistricting is an inappropriate remedy for trial judge elections apply to the election of appellate judges.

Plaintiffs also argue that the *Nipper* line of cases is inapplicable because those cases dealt with trial judges, where single judges decide cases, and not appellate judges, where panels of judges decide cases. But the Eleventh Circuit never said that the "linkage" interest has no application to appellate courts; it merely noted in *dicta* that there "*might* be more to be said for some form of 'representation' on a collegial court." *Nipper*, 39 F.3d at 1535 n.78 (emphasis added). And as Defendants have already pointed out, each of the policies supported by at-large election of trial judges applies equally to the at-large election of appellate judges. Doc. 17 at 30-40. Whether trial or appellate courts, an injunction requiring subdistricting would not show proper respect for Alabama's constitutional model, would strip voters of the right to vote on all but one member of the appellate courts, would marginalize voters of the minority race in each district, would negatively impact judicial independence, and would limit the pool of qualified candidates. *Id.* There is therefore no reason to limit *Nipper* and its progeny to trial courts.

Another State could choose a different model, of course. A few do. Louisiana and Mississippi, for example, have chosen to elect certain judges by districts. *See* La. Const. Art. V, Sec. 4; Miss. Const. Art. VI, Sec. 145-145A. Illinois also elects some trial judges by districts, but as Judge Easterbrook noted, this does not require other States to do the same: "In a federal system, states are entitled to do things differently; Illinois' willingness to use subdistricts no more obliges Wisconsin to do so than the other way around." *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1201 (7th Cir. 1997).

This brings up a modification Defendants must make to their Motion to Dismiss, where we said, "[T]o the best of Defendants' knowledge, no federal court has read the Voting Rights Act to require the relief Plaintiffs seek in this action." Doc. 17 at 9. Plaintiffs cite to District Court cases from Mississippi and Louisiana where subdistricting was imposed as a remedy. *See Martin v. Mabus*, 700 F.Supp. 327, 332 (S.D. Miss. 1988); *Clark v. Roemer*, 777 F.Supp. 445 (M.D. La. 1990). But there are two important reasons that these cases give no authority for this Court to impose subdistricting in Alabama. First, Mississippi and Louisiana are part of the Fifth Circuit, and the two decisions cited were issued before the Fifth Circuit held that subdistricting was *not* an appropriate remedy for alleged vote dilution in at-large elections of Texas trial court judges. *League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993).

Second, as noted above, Louisiana and Mississippi *already* elected judges by districts. Having made the choice to subdivide, the "linkage" interest in those states may be weighed differently than in a state that, like Alabama, has elected judges on an at-large basis for 150 years (or as long as we have elected judges). The District Court in Louisiana reasoned that "Louisiana has repeatedly divided judicial districts into smaller districts. … The State's own actions refute any argument that there is any actual state policy as to the size of judicial election districts." *Clark*, 777 F.Supp. at 480. That simply is not true in Alabama.

And by the way, that is indeed something of which this Court may take judicial notice. Plaintiffs take issue with Defendant's historical section, but they do not, and cannot, dispute the basic facts based on historical documents: Alabama first provided for popular election of appellate judges in the Reconstruction Constitution of 1868, with black participation, and from that date to the present Alabama has elected judges on an at-large basis. There is no plausible allegation that Alabama had a racial purpose for adopting at-large elections for judges.

Unlike Mississippi and Louisiana, Alabama has chosen to elect judges at-large to promote the interests of judicial independence and accountability, and to give all Alabama voters a voice in the election of all appellate judges. These interests are supported by at-large elections of both trial and appellate courts.

III. Plaintiffs' remedy would render Section 2 constitutionally suspect.

The Constitutional concerns Defendants raise are far from trivial. Plaintiffs brush these concerns off because, they say, courts impose districting as a remedy all the time. The cases they cite, however, do not support this proposition. They cite *Chisom v. Roemer,* 501 U.S. 380 (1991), but *Chisom* did not consider remedy at all. The Court merely held that judicial elections are not wholly removed from the reach of Section 2. Plaintiffs also cite the district court cases from Louisiana and Mississippi discussed above (*Martin a*nd *Clark)*, but Louisiana and Mississippi were already electing judges by districts. And Plaintiffs cite *Thornburg v. Gingles,* 478 U.S. 30 (1986), but that case dealt with legislative districts, not courts.

The remedy Plaintiffs seek is not simply shifting existing district lines around, as in a typical redistricting case, but changing the very structure of Alabama's government. To elect judges by district and impose a sense of representation on judges would change the very nature of the office:

> The decision to make jurisdiction and electoral bases coterminous is more than a decision about how to elect state judges. It is a decision of what *constitutes* a state court judge. Such a decision is as much a decision about the structure of the judicial office as the office's explicit qualifications such as bar membership or the age of judges.

League of United Latin American Citizens v. Clements, 999 F.2d 831, 872 (5th Cir. 1993). As the Eleventh Circuit held in *Nipper*, Section 2, properly read, does not give courts the authority to force a new form of government on the states:

"Nothing in the Voting Rights Act suggests an intent on the part of Congress to permit the federal judiciary to force on the states a new model of government." 39 F.3d at 1531.

Plaintiffs also disagree with the concern that subdistricting would lead to submersion because, they say, submersion already exists. But consider the African-American voter who lives in DeKalb or Cullman counties, each less than 2% African-American (according to data from the 2010 U.S. Census, available at https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml (last visited December 1, 2016)). If one accepts Plaintiffs' allegations about block voting in judicial elections, that voter is now part of a block of around 25% of voters state-wide. If Alabama subdivides to elect judges, the voter would be part of a far smaller minority, as would the white voters placed in the predominately African-American districts. Plaintiffs are not ending voter submersion as it allegedly exists under their theory; they are multiplying it and spreading it around, then making things even worse by taking away the right to vote on judges outside the district where a voter lives.

The Eleventh Circuit has wisely noted the limitations of Section 2. Reading the statute to allow a federal court to change a state's chosen judicial model, strip Alabamians of the right to vote on most appellate judges, and sort voters by race would threaten to push Section 2 beyond constitutional limits.

IV. Standing and sovereign immunity

Defendants also contest standing. For the individual Plaintiffs, assuming that vote dilution exists, the question remains whether subdistricting would redress the alleged injuries of these specific Plaintiffs. All we know is that the individual Plaintiffs are African-American voters who live in certain counties. We do not know if they would be in a majority-black district under Plaintiffs' proposed remedy, or if would they be part of a five-percent African-American district (and therefore part of a smaller minority than they are now, taking the block voting allegations as true). It does not solve the problem to say that at least some African-American voters would be placed in a majority-black district, because "[t]he right to vote is personal." *Reynolds v. Sims*, 377 U.S. 533, 561 (1964), citing *United States v. Bathgate*, 246 U.S. 220, 227 (1918). Some voters would be more in the minority, and no allegation tells us which plaintiffs would be in a majority-black district under Plaintiffs' proposed remedy.

In addition, the named individual Plaintiffs (like all Alabama voters) presently have the right to vote on nine Alabama Supreme Court Justices. Plaintiffs would remove all right to vote from the Plaintiffs on eight of those nine judges. Plaintiffs' remedy, in other words, gives Plaintiffs less of a right to vote than they have now, so it would not appear to redress anything.

For the organizational Plaintiff, Plaintiffs assert that the NAACP is not suing because of its own injury, but is instead claiming associational standing to bring claims on behalf of its members. To make that claim, the NAACP must show that (1) its members have standing to sue in their own rights, (2) the interests the NAACP seeks to protect are germane to the association's purpose, and (3) neither the claim asserted nor the relief requested must require the participation of the association's members. *See Region 8 Forest Serv. Tember Purchasers Council v. Alcock*, 993 F.2d 800, 805 (11th Cir. 2004). Because the NAACP's members are not similarly situated, Plaintiffs cannot establish the third requirement.

When an association's members are affected differently by an alleged wrong, the association may not bring claims on behalf of its members. For example, a plaintiff could not claim associational standing to bring a takings claim on behalf of its members because such a claim "will vary depending upon the economic circumstances of each of its members," thus requiring the participation of its members. *Georgia Cemetery Ass'n v. Cox*, 353 F.3d 1319, 1322-23 (11th Cir. 2003). Likewise, a home builders association could not bring a takings challenge to a city's building impact fees because not all of it members had paid the fee. *Greater Atlanta Home Builders Ass'n, Inc. v. City of Atlanta, Ga.*, 149 Fed. Appx. 846, 848 (11th Cir. 2005). And here, an NAACP member in the "black belt" is in a very different situation than one in a region of the state with fewer minorities. The

former is likely to be placed in a majority-black district, if the Court orders subdistricting, but the latter is likely to be more in the minority than he is now. Assuming the NAACP member in Lauderdale or Cullman County wants to vote as part of a block, he would likely consider himself to be better off now with State-wide elections than if he was in a district that was less than 5% black. This disparity of the members' circumstances, and of interests, show that the NAACP cannot claim associational standing.

Concerning sovereign immunity, Plaintiffs cite the same three non-binding, unpersuasive decisions that Defendants noted in their motion. These cases have almost no analysis. Nothing Plaintiffs argue demonstrate an express intent on behalf of Congress to abrogate sovereign immunity, and Plaintiffs' claims against the State of Alabama are therefore barred.

* * * *

In the end, Plaintiffs disagree with the Eleventh Circuit's holdings in *Nipper*, *SCLC*, and *Davis*. Unless the Court sits *en banc* and reconsiders those opinions, however, they control this action. Those decisions provide that Plaintiffs must plead a proper remedy to assert a Section 2 claim, and that there is no proper remedy to a claim of alleged vote dilution in an at-large election system of judicial candidates. Plaintiffs' claims are therefore due to be dismissed.

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CERTIFICATE OF SERVICE

I certify that on December 2, 2016, I filed the foregoing document electronically via the Court's CM/ECF system, which will send a copy to all counsel of record.

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